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**IN THE  
COURT OF APPEALS OF INDIANA**

KENNETH K. TESKY,  
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 37A03-0706-CR-261

APPEAL FROM THE JASPER CIRCUIT COURT  
The Honorable John D. Potter, Judge  
Cause No. 37C01-0306-FD-258

**December 3, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Kenneth K. Tesky admitted to violating the terms of his probation, and the trial court subsequently ordered him to serve 850 days of his previously suspended sentence.

Tesky presents two issues for review:

1. Did the trial court abuse its discretion in ordering Tesky to serve 850 days of his previously suspended sentence?
2. Did the trial court take into account all credit time to which Tesky was entitled?

We affirm.

On December 16, 2003, Tesky pleaded guilty under a plea agreement to various crimes under three different causes, Cause Nos. 37C01-0302-FD-095 (FD-095), 37C01-0206-FB-262 (FB-262), and 37C01-0306-FD-258 (FD-258). A sentencing hearing was conducted on January 22, 2004. Specifically, under FD-095, Tesky pleaded guilty to intimidation and battery by bodily waste, both class D felonies, and operating while intoxicated as a class A misdemeanor. Tesky was sentenced to three years with one and one-half years suspended on each class D felony offense and to one year on the class A misdemeanor, with the sentences to run concurrently. Under FB-262, Tesky pleaded guilty to class A misdemeanor contributing to the delinquency of a minor and was sentenced to one year with all but thirty days suspended. The sentence was ordered to be served consecutive to FD-095. Under FD-258, Tesky pleaded guilty to class D felony domestic battery and was sentenced to three years with one year suspended to probation. This sentence was ordered to be served consecutive to FD-095 and FB-262. In total, Tesky was sentenced to an aggregate term of seven years with three years and five months suspended to probation.

On March 7, 2005, trial court modified Tesky's sentences so that he could serve the remainder of his sentences under all three causes on formal probation. Following the modification, Tesky's sentence was modified such that when turned over to serve his sentence under FD-258, he would be placed on formal probation for 1,061 days.<sup>1</sup> Conditions of Tesky's probation included that he not commit new criminal offenses and that he was prohibited from buying, possessing, or consuming alcoholic beverages.

On August 6, 2006, Tesky consumed an alcoholic beverage and a portable breath test indicated that Tesky had a blood-alcohol concentration of .51 percent.<sup>2</sup> Police also discovered a half-full can of beer stuffed inside Tesky's pants. On September 7, 2006, a police officer observed Tesky in a state of intoxication at a convenience store. A portable breath test indicated Tesky had a blood-alcohol concentration of .13 percent. On September 26, 2006, Tesky consumed an alcoholic beverage and was arrested for public intoxication as a class B misdemeanor. A portable breath test indicated that Tesky's blood-alcohol concentration was .102 percent.

On November 29, 2006, a petition to revoke Tesky's probation was filed under FD-258.<sup>3</sup> At an April 17, 2007 fact-finding hearing, Tesky, pursuant to an agreement,

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<sup>1</sup> Tesky's three-year sentence under FD-258 is equivalent to 1,095 days. The record reveals that Tesky was given seventeen days of credit for actual jail time served and seventeen days good-time credit, thereby leaving 1,061 days to be served on formal probation. At the time of the modification, Tesky had yet to be turned over to serve his sentence under FD-258 because he was still serving time on formal probation under FD-095.

<sup>2</sup> We recognize that the reported blood-alcohol concentration of .51 percent, to which there are two references made in the record, is unusually high and is often considered lethal. We further recognize that the parties do not dispute this fact. In any event, Tesky admitted to violating his probation by consuming and possessing alcohol on the day in question. His precise blood-alcohol concentration was not relevant.

<sup>3</sup> There were three separate petitions to revoke probation filed under FD-095, one of which was later dismissed. On November 9, 2006, the trial court held a fact-finding hearing on the two remaining

admitted to violating his probation on three separate occasions, and in exchange, the State agreed to dismiss a public intoxication charge under another cause number. Thereafter, the trial court terminated Tesky's probation and ordered that he serve 850 days (i.e., two years and four months) of his previously suspended sentence. On May 16, 2007, Tesky filed a motion to correct error which was denied by the trial court following a hearing on May 22, 2007.<sup>4</sup>

1.

Tesky argues that the sentence imposed for his probation revocation is “inappropriately harsh” given the circumstances of the case. *Appellant's Brief* at 6. Tesky maintains that, in ordering that he serve 850 days of his previously suspended sentence, the trial court failed to consider his “great successes” serving previous sentences on home detention, electronic monitoring, or work release, *Appellant's Brief* at 7, and that he was cooperative in the instant matter by admitting that he violated the terms of his probation. Tesky further asserts that incarceration will not permit him to catch-up on his child support obligations or obligations of his business. In light of his circumstances, Tesky maintains that a lesser sentence is warranted.

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petitions to revoke. At the conclusion of the hearing, the court revoked Tesky's probation under FD-095 and ordered Tesky to serve the remainder of his sentence previously imposed and suspended. Tesky was given credit for time served and in-patient treatment.

<sup>4</sup> At that hearing, Tesky indicated that he wished to withdraw his motion to correct error, but realized that if he withdrew his motion, he could not file a timely notice of appeal of the trial court's April 17, 2007 order. The trial court therefore denied the motion to correct error thereby giving Tesky an additional thirty days to file his notice of appeal. *See* Ind. Appellate Rule 9(A)(1).

We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Sanders v. State*, 825 N.E.2d 952 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it. *Abernathy v. State*, 852 N.E.2d 1016 (Ind. Ct. App. 2006).

Here, it is clear that Tesky has a substance abuse problem. Tesky admitted to violating his probation on three separate occasions within a relatively short period of time by consuming alcohol. This time, the leniency afforded to Tesky through formal probation obviously did not result in the "great successes" that Tesky claims he had achieved in the past. *Appellant's Brief* at 7. Given the repeated violations and the circumstances of this case, the trial court had ample basis for its decision to order Tesky to serve 850 days of his previously suspended sentence. We therefore cannot say that the trial court abused its discretion.

2.

Tesky argues that the trial court did not take into account all credit time to which he was entitled. Tesky presented no evidence to support his claim, but rather, on appeal, relies upon remarks by the prosecutor during the revocation hearing in the instant cause indicating that Tesky had not received full credit for in-patient treatment under FD-095.<sup>5</sup>

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<sup>5</sup> During the revocation hearing in the instant cause, Tesky's attorney raised the issue of whether Tesky had been given credit for all of the time to which he was entitled under FD-095. There was significant discussion at that time regarding what portion of Tesky's sentences under FD-095, FB-262, and FD-258 had been served and what credit he had been given toward those sentences. It was made clear, however, that there were no issues regarding credit time awarded in the instant cause.

Tesky contends that if he had been given proper credit time under FD-095, he would have started serving his sentence in the instant cause sooner.

The issue of Tesky's credit time under FD-095 is not properly before us in this appeal from the revocation and order that Tesky serve 850 days of his previously suspended sentence under FD-258. As noted above, Tesky was found to have violated his probation under FD-095 and was ordered to serve his previously suspended sentence on November 9, 2006. The credit time to which Tesky now claims he was entitled but erroneously denied was directed to the sentence to be served under FD-095. Tesky's recourse would have been to file a notice of appeal of the November 9, 2006 order challenging the amount of credit time for in-patient treatment awarded in FD-095. Tesky cannot now challenge the amount of credit time to which he claims he was entitled under a different cause.

Judgment affirmed.

SHARPNACK, J., and RILEY, J., concur.